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Supreme Court, U. S.
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No. . . . .

IN THE

Supreme Court of the United States

October Term, 1980

PENNSYLVANIA PIPELINE, INC., also known as PENNSYLVANIA PIPELINE COMPANY and PENNSYLVANIA PIPELINE AND CONSTRUCTION COMPANY,

Petitioner,

vs.

NORTHERN CALIFORNIA DISTRICT COUNCIL OF HOD CARRIERS, BUILDING AND CONSTRUCTION LABORERS, and CONSTRUCTION, PRODUCTION AND MAINTENANCE LABORERS LOCAL UNION NO. 1130,

Respondents.

Petition for Writ of Certiorari.

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Petition for Writ of Certiorari.

Petitioner applies for a Writ of Certiorari and in support of its application states:

Questions Presented.

Whether the due process and equal protection provisions of the United States Constitution permit the making of a binding decision by an arbitrator chosen entirely without the consent or participation of one party to the dispute.

Whether the due process and equal protection provision of the United States Constitution permit a party to be bound

to an arbitration to which he did not in any wise consent either directly or through any agency.

Whether federal labor law requires that new members joining a multi-employer association which is coincidentally an employer bargaining unit automatically become bound to existing labor agreements in spite of the new members' clearly expressed intention to be a "non-union" member consistent with this status as defined in the association's by-laws.

Whether an arbitrator may constitutionally effect a forfeiture.

Whether a labor union local may validly require an open shop contractor to employ only subcontractors having contracts with that local, regardless of any agreement with the union and regardless of whether non-union men would be working side by side with union men.

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Jurisdiction.

The order dated April 30, 1980 denying petitioner's appeal to the California Supreme Court is set forth in Appendix "A" *infra* page 17. The decision of the California District Court of Appeal is set forth in Appendix "A" *infra* pages 1 through 10. The order of the California District Court of Appeal denying petitioner's motion for rehearing is set forth in Appendix "A" *infra* page 16. The decision of the Superior Court of the State of California, for the County of Alameda, is set forth in Appendix "A" *infra* pages 12 through 15.

Jurisdiction is based upon 28 USC 1257(3) and this Court's Rule 19 in that the state courts below have decided federal questions of substance not heretofore determined by this Court, and other federal questions not in accord with applicable decisions of this Court. All state court remedies have been exhausted, the California Supreme Court having denied petitioner's application on April 30, 1980. All federal questions have been seasonably raised and have not been abandoned. References to the applicable federal questions raised at each level are collected in Appendix "B" attached hereto.

Statute and Constitutional Provisions Involved.

United States Constitution, Amendment XIV, Section 1:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

29 USC §§151-166, and particularly §157, which provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain

collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the *right to refrain* from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

and §158(e) which provides:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel

and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

Statement of the Case.

In brief outline, the facts are as follows:

1. Petitioner, an open shop contractor, commenced a project in Tuolumne County, California. Wage rates were determined by State and Federal regulations. As is normal such "prevailing wages" are pegged at union rates. (C.T. 53:27 - 54:10.)

2. At the start of the job, petitioner was approached by unions. Petitioner expressly declined to execute agreements but hired union and non-union members impartially. (C.T. 54:10 - 55:3.)

3. Sensing trouble from the operating engineers, petitioner was amenable to solicitation from the Underground Contractors Association which represented it could "keep unions off his back". (C.T. 55:6 - 55:16.)

4. On July 2, 1975, petitioner submitted an application to the UCA as a "contractor member". The application contemplated the issuance of a certificate of membership which would be subject to the Association's by-laws. (C.T. 64.)

5. The by-laws were not furnished to petitioner until March of 1976. (C.T. 47:7-12; C.T. 57:3-8.)

6. If petitioner's President had seen the by-laws at any relevant time, he would have observed that they describe two kinds of contractor members, "union" and "non-union". Petitioner's intention, of course, was to be the latter. (C.T. 67-68; C.T. 55:16-21; C.T. 214:3-9.)

7. The provision of the by-laws relating to union members provides that such members appoint the Association

as agent to deal with unions with which the *member* has collective bargaining relations. (C.T. 68.)

Since petitioner had no agreements with respondent Union, this clause, even if applicable, would not operate to create any agency in the UCA.

8. Sometime in November of 1975, the Operating Engineers pulled their members off the job and respondent Union ordered its members to do likewise. (C.T. 55:26 - 56:10.)

9. Petitioner sought the advice of a labor consultant who dictated a telegram to respondent demanding that the workers return. (C.T. 47:13 - 48:2; C.T. 65.)

10. Most of the workers did return over a short period of time. (C.T. 58:17 - 59:7.)

11. The Union then complained that Stan Maples who had a paving subcontract for $9,105.00 was non-union. (C.T. 48:3-15; C.T. 59:28; C.T. 231; C.T. 18.)

12. Petitioner attended a meeting with Union representatives on December 16, 1975 to discuss the matter. He was accompanied by his labor consultant, as well as by his new allies from the UCA. (C.T. 48:3-15; C.T. 56:14-22.)

13. At the meeting the contention was made that by reason of membership in the UCA petitioner was bound to the Union. (C.T. 56:22-25.)

14. Petitioner immediately and clearly denied that this was the case. The by-laws still had not been made available to petitioner but because of the mere possibility involved, petitioner resolved to abort its pending application and this was quickly accomplished and was memorialized by a letter of termination from the Association dated January 21, 1976. (C.T. 48:3-12; C.T. 56:18 - 57:2.)

15. The formal minutes of the meeting confirm that the issue was only the "unauthorized" paving subcontractor, Stan Maples. (C.T. 231; C.T. 18.)

16. Thereafter, however, the Association and the Union continued to deal as though they could bind petitioner and set up an "arbitration." (C.T. 12-14.)

17. Petitioner had no notice of this until the day before the hearing and having no time to prepare anyway, declined to participate. (C.T. 48:16-27.)

18. Unknown to petitioner, the controversy had somehow expanded to the point where the arbitrator awarded approximately $70,000.00. (C.T. 25-32.)

19. Included in the award was $17,980.00 to 3 men supposedly "entitled" to have been hired by Maples to perform a subcontract, the total price of which was only $9,105.00. (C.T. 25-32; C.T. 53:28 - 54:10; C.T. 59:25 - 60:2.)

20. Included in the award were amounts for "subsistence" and awards to men who at the time were working for petitioner and drawing full pay. (C.T. 25-32; C.T. 58:17 - 60:2.)

21. Set forth in Appendix B at the pages indicated are pertinent portions of the following relevant documents:

Application, p. 18.

By-Laws §§7 and 8, p. 21.

Laborers Master Agreement §11, p. 23.

References to the applicable federal questions raised at each level are collected in Appendix C attached hereto.

REASONS FOR GRANTING THE WRIT.

PETITIONER NEVER AGREED TO ARBITRATE.

In a totally inexplicable departure from their usual solicitude for the rights of persons living and doing business within the State, the California Courts have perpetuated a grievous miscarriage of justice in this case.

The factual basis of the opinion is set forth on page 5 line 54 and again on page 8 line 53 as follows:

> The employer "had actual knowledge of (Article 1 Section 7 of the by-laws) and knowingly consented to the association acting on its behalf long before its last minute withdrawal from the association."

However, if this were really true, petitioner would not have the gall to trouble the courts with this affair. Similarly the resolution of the issues in the case would not justify a published opinion. The fact is that the record is *totally bare of the slightest hint* of any evidence to support this conclusion. It simply does not exist. This is not a question of a conflict in the evidence. This is a case of no evidence of any kind whatsoever that membership in the UCA comported adoption of the obligations which the Courts below have forced upon petitioner.

There are numerous expressions in the cases to the effect that arbitration is to be encouraged and that arbitration agreements will be enforced wherever feasible. It is fundamental, however, that arbitration is a consensual arrangement and that no one may be compelled to arbitrate unless he has agreed to do so.

> *Drake Bakeries v. Local 50 Am. Bakery & Confectionary Workers*, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962);
>
> *Georgia Power Co. v. Cimarron Coal Corp.*, 526 Fed.2d 101 Cert. Den., 425 U.S. 952, 96 S.Ct. 1727, 48 L.Ed.2d 195;

Unimart v. Superior Court for County of Los Angeles, 1 Cal.App.3d 1039, 82 Cal.Rptr. 249 (1969); (also at C.T. 87.)

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962). (C.T. 95.)

Moreover, an agreement to arbitrate may not be presumed. A party contending for such an agreement has the burden of demonstrating the elements of a contract to resolve the dispute in question in this manner.

Tri-Cor, Inc. v. City of Hawthorne, 8 Cal.App.3d 134, 87 Cal.Rptr. 311 (1970); (C.T. 107.)

Commercial Factors v. Kurtzman Bros., 131 Cal.App.2d 133, 280 Pac.2d 146 (1955); (C.T. 112).

Wheeler v. St. Joseph Hospital, 63 Cal.App.3d 345, 133 Cal.Rptr. 775 (1976).

Though the arbitrator purported to find the existence of an agreement, it is the function of the courts to determine in the first instance whether there is an agreement to arbitrate and the scope of the power vested by the parties in the arbitrator.

Woody v. Sterling Alum. Prods. Inc., 244 F.Supp. 84 Aff'd, 305 Fed.2d 448 Cert. Den., 386 U.S. 957, 87 S.Ct. 1026, 18 L.Ed.2d 105;

Freeman v. State Farm Insurance, 14 Cal.3d 473, 121 Cal.Rptr. 477 (1975). (C.T. 116.)

Here respondent has wholly failed to show any agreement to arbitrate made either by Pennsylvania Pipeline or by any person authorized to act for it.

Nothing in the application signed by petitioner would give any reasonable applicant the slightest clue that he was adopting any collective bargaining agreement with anyone; let alone agreeing to arbitrate any dispute with any labor

union. The cases, and particularly the later cases, have very clearly developed the principle that if a party wishes to bind another in an agreement to arbitrate future disputes, such purpose must be accomplished in a way so that each party to the arrangement will fully and clearly comprehend that an agreement to arbitrate exists.

United Steelworkers of America v. Crane Co., 456 F.Supp. 385 (W.D. Pa. 1978);

Milwaukee Topographical Union v. Madison Newspapers, 444 F.Supp. 1223 (W.D. Wis. 1978);

Commercial Factors v. Kurtzman Bros., supra;

Wheeler v. St. Joseph Hospital, supra.

See also:

Davis v. Blue Cross of Northern Cal., App., 144 Cal.Rptr. 810 (1978).

Respondent as well as the Courts below have been invited, if not challenged, to point to any evidence whatever in the record supporting the conclusion that petitioner agreed to arbitrate with respondent. Since all the evidence is directly contrary, the only factual discussion which can be found on the point concerns two circumstances supposedly supporting the result. But, an examination of these matters should make it clear that they simply do not support the conclusion that petitioner voluntarily agreed to submit any dispute with the Union to arbitration. Consider them in order:

1. Petitioner Availed Itself of Hiring Facilities and "Demanded" That the Union Supply Laborers.

It is simply not true, as apparently assumed by the Court, that the Union would not supply workmen in the absence of an unconditional acceptance of a collective bargaining agreement. The *uncontradicted* facts from the declaration of petitioner's President are that:

"The corporation operates on an open-shop basis and customarily employs both union and non-union employees. This makes no difference as far as wage rates are concerned since public works contracts in California are governed by certain provisions of the State Labor Code which require the payment of the general prevailing wage rates. These are invariably based upon union agreements in force in the areas involved. For example, on the job involved in this dispute, the Tuolumne County Water District No. 2 made and published a prevailing wage rate determination which sets forth rates which are identical to those prescribed in applicable collective bargaining agreements in force in the area. (Exhibit "A" attached in original.) Nonetheless, I prefer to operate on an open-shop basis so that I can maintain my management prerogatives. I find that most unions will attempt to secure agreement by requesting that I execute a so-called short-form which adopts the then current agreement for the term of the particular job involved, but that if I refuse to do so they will nonetheless furnish such employees as I request.

During the Spring of 1975, I became aware of a project contemplated by the Tuolumne County Water District No. 2, generally described as 'Sonora to Columbia—Gibbs Ranch—Columbia Junior College Interceptor (Contract No. 4)'. After examining the plans and specifications and the site of the work and being satisfied that this work was within my company's area of expertise, I prepared and submitted a bid on behalf of Pennsylvania Pipeline & Construction Co., Inc.

Thereafter, I was determined to be low bidder and this information was published in various trade publications for the information of interested parties.

Shortly thereafter I was contacted by union representatives including Mr. Louis F. Miller who indicated

that he represented Local 1130 of the Laborers Union. I advised Mr. Miller of my policy and that I did not care to execute an agreement with his union but that I would be happy to employ competent union members on an impartial basis.

While Mr. Miller seemed to accept my position and was cooperative, a Mr. Jay Victor representing the Operating Engineers made some remarks which led me to believe that I could expect trouble from this quarter. Thus, when I was contacted a few days later by a Mr. John Pestana who said that he represented the Underground Contractors Association, that he had a strong organization and could 'keep the unions off my back', I was very interested and upon his solicitation submitted an application for membership together with my company's check for $100.00. [The pertinent provisions of this application are set forth in Appendix B page 1 to this petition.] . . . There is nothing in the application indicating that by signing it and submitting it I was agreeing to the terms of any collective bargaining agreement. *If I had known that anyone would suggest the contrary, I certainly would not have applied for membership in the UCA since my intention was to remain free of union commitments.*" (Emphasis added.) (C.T. 53:27 - 55:21.)

2. Petitioner Attended the "Grievance Hearing."

In a terrible perversion of petitioner's perfectly innocent act of attending the meeting of December 16, 1975, the Court construes it as constituting an endorsement and acceptance of the "procedures set forth in the master agreement." The evidence, however, is that at the time of this meeting, petitioner did not have any knowledge actual or constructive of any such procedures. The moment it was suggested that something more was involved than an informal settlement conference, petitioner made its position

clear and took steps to withdraw from the Association. (C.T. 214:10-17; C.T. 56:18 - 57:2.) The notion that by attending the meeting to announce that it was not bound, it thereby became bound is mind boggling.

The UCA Never Became Petitioner's Agent and if It Did That Agency Was Clearly Terminated Before Any of the Acts of UCA Which Led to the Arbitration.

Just because petitioner goes to a meeting does not amount to the creation of an agency. Petitioner joined the Association to secure its *aid*. There is nothing in the record to indicate that petitioner ever appointed the UCA its *agent* at all let alone empowered it to bind petitioner to an arbitration agreement. Even if petitioner had dealt with reference to the by-laws, which it did not, they provide to the contrary.

Petitioner did not, as stated by respondent, wait until the eve of the arbitration hearing to advise the Union of the Association's lack of authority. This was done orally at the grievance meeting in December of 1975 (C.T. 48:6-8; C.T. 56:18-22) and confirmed in writing not later than April 14, 1976 (C.T. 216:27 - 217:7).

Even after attending the grievance meeting and even after receiving and replying to this letter, respondent Union continued to deal with the Association as though it had authority. As previously explained, the Association was never appointed the contractor's agent since, even if Section 7 of the by-laws became binding upon petitioner, the only authority conferred, was as to unions which *petitioner* had contracts (C.T. 68) and respondent was not in that category.

It is Hornbook law that an ordinary agent's power to act may be revoked at the mere instance of the principal.

Hunt v. Rousmanier's Administrators, 21 U.S. 174, 8 Wheaton 174, 5 L.Ed. 589;

California Civil Code, Section 2356;

Elevator Operators Union v. Newman, 30 Cal.2d 799, 807, 186 Pac.2d 1 (1947).

Here the purported principal and agent mutually terminated whatever relationship they had not later than January 31, 1976 (C.T. 56:22 - 57:2; C.T. 66). As pointed out above, the Union had adequate and ample notice of the Association's lack of authority both orally and in writing.

Indeed, the Union knew perfectly well that petitioner intended to operate on an open-shop basis from the inception of the project. In his uncontroverted declaration, Mr. DiSandro, petitioner's President, testifies that he was contacted by respondent's Mr. Miller shortly after the job was awarded and on at least two occasions thereafter, and on each occasion expressly declined to execute a short form agreement (C.T. 54:25 - 55:5; C.T. 55:22-25).

In spite of the above uncontroverted facts and well settled law, the Court below apparently holds that simply by virtue of the relationship of the parties the UCA automatically became petitioner's agent and having achieved the status cannot be denied it in spite of the clearest expression from petitioner communicated to all concerned.

Although it does not really answer the point since the first clear communication was made at the "grievance" meeting under discussion and since the argument begs the question of whether the procedure applies, the Court below held that the right of access to the grievance procedure is deemed "vested" when the alleged grievance arises. But what was the "*grievance*" which was pending?

As of December 1975 when petitioner declined to proceed further with its membership application and indeed in January 1976 when all ties with the Association were formally severed and any possible power in the Association to deal on petitioner's behalf ceased, *only* the so-called "subcon-

tractor'' dispute was involved. (C.T. 231.) According to the ''arbitrator's'' opinion this subsequently resulted in an award of some $18,000.00 (see calculation *infra*). How the other matters came to be involved is a mystery but certainly petitioner never agreed either directly or through any authorized agent to add these matters to the dispute.

Furthermore, a misconception has arisen concerning the nature of this meeting. This was no formal hearing. This was little more than an informal airing of the problem. (C.T. 48:3-13.) Nothing was said to indicate that some ponderous machinery was being set in motion which would threaten petitioner's existence. Furthermore, it must be emphasized that petitioner promptly and clearly disclaimed any obligation to deal with the union. (C.T. 56:18-22.)

The Opinion Misconstrues Petitioner's Position on ''Affiliate Members''.

The opinion, as written, most unfairly characterizes petitioner's position concerning ''affiliate members.'' (Opinion, page 7, footnote 2.) In the first place, there is *no such status* as an ''affiliate member.'' On the membership application, which is the *only thing petitioner ever saw* at any relevant time, there are places to check off for applicants as ''*contractor*'' members or ''*associate*'' members (*i.e.*, pipe suppliers, C.T. 67). Since petitioner was a contractor, the ''*contractor*'' box was checked on the application. (C.T. 64.) It is absolutely clear and unchallenged that the only kind of member petitioner wanted to be was the kind that the Association could help to ''keep unions off its back.'' (C.T. 55:6-21; C.T. 214:3-9.)

This position has been uniformly supported and urged from the very inception of these proceedings. (C.T. 80:22 - 81:1; C.T. 209:3-23.)

In the reply brief, however, respondents made the gratuitous statement that:

> "Pennsylvania Pipeline was bound to this Master Agreement because of the by-laws of the Underground Contractors Association of Northern California, which provided for two membership categories. Pennsylvania Pipeline became a general member."

Thus it was *respondent* and not petitioner who raised the issue of "affiliate contractor members."

Petitioner has merely made the obvious response to this contention. If respondent wants to pretend that petitioner had seen the by-laws and had contracted with reference to them the only status therein described which is consistent with petitioner's clearly expressed intention is that of "affiliate contractor member."

An applicant has only two choices on the form, "contractor" or "associate." According to the by-laws, a "*contractor*" member can *either* be a *union* member or a *non-union* member. It is hard to imagine how petitioner could have made it any clearer that it wanted to be a non-union member; both to the Association and to the union. Whether it be called non-union member or affiliate contractor member, petitioner's intention was clear and unvarying. By what possible process of reasoning can petitioner now, in defiance of its clearly expressed intention, be bound to an arbitration clause in an agreement which was never seen and was completely unknown to it?

The Forfeiture Issue Was Raised Below and Is Well Founded.

On page 10 of the opinion appears the statement that "the award . . . did not arise from an irrational construction

of the provisions of the Master Agreement" and "accordingly, the Employer was precluded from raising it for the first time on appeal."

The Court has apparently overlooked the factual showing starting at page 58, line 17 of the Clerk's Transcript, and continuing to page 60, line 2, and the argument directed to the Trial Court commencing at page 84, line 21.

Furthermore, the award constitutes an obvious and demonstrable forfeiture. The arbitrator decided that 3 men, Ralph, Cowley and Lee, were entitled to the jobs held by the employees of Stan Maples who performed a subcontract for $9,105.50 (C.T. 59:28). He awarded them the following amounts:

	"Wages"	"Subsistence"		"Fringes"		
Melvin Ralph	$ 3,741.60	$ 780	$ 384	$ 672	$ 432	$ 48
Gary Cowley	3,669.60	780	384	672	432	48
Sherman Lee	3,621.60	780	384	672	432	48
	$11,032.80	$2,340	$1,152	$2,016	$1,296	$144

TOTAL: $17,980.80

In other words, $9,105.50 paid for all the paving on the job, including wages at what amount to union rates (C.T. 53:28 - 54:10; C.T. 63). If having to pay double the amount of any possible work involved including subsistence to men who were not on the job and obviously did not "subsist" is not a forfeiture, then the word had taken on new meaning.

Furthermore, as pointed out to the Court, many of the workmen involved left the job improperly at the urging of

their union, but returned and were actually working for petitioner and being paid for the same periods for which they are now to be compensated again (C.T. 58:25 - 59:11). This is a forfeiture.

Petitioner Was Not Afforded Due Process in Connection With the Arbitration Hearing.

The record shows that petitioner operated as an open-shop contractor and joined the Association in order to avoid involvement with unions (C.T. 53:27-28; C.T. 54:28 to 55:16; C.T. 214:3-9). Upon being advised of the contention that the application for membership bound petitioner to a collective bargaining agreement petitioner promptly took steps to withdraw from the Association (C.T. 56:25 - 57:2; C.T. 214:10-17). This was done, effective January 31, 1976 (Counterfinding #4 (C.T. 224) allowed by order (C.T. 235)). Respondent was given prompt notice of this and of the Association's lack of authority (C.T. 56:18 - 57:2; C.T. 218, 219; C.T. 221).

Nonetheless, respondent continued to process its secret "arbitration" proceeding. The so-called grievance meeting of December 16, 1975 involved the conduct of Stan Maples who had a paving subcontract for a little over $9,000.00 (C.T. 48:3-15; C.T. 231-232-233; C.T. 59:28 - 60:2). The claim was made that Stan Maples was obligated to employ union laborers (C.T. 48:3-12). Such a dispute could not possibly have involved more than the amount of the subcontract. Moreover, petitioner maintained uniformly that there was no union obligation and in any event such a subcontractor clause was illegal. (C.T. 48:3-12; C.T. 56:14-22.)

On June 29, 1976, petitioner discovered that a hearing on its dispute with the laborers was on the following day (C.T. 48:16-27). Refusing to recognize their authority and

in any case with no time to prepare, petitioner did not appear. Later petitioner discovered that the small controversy involving a subcontractor had suddenly escalated into an arbitration award of over $70,000.00.

Surely the Constitution of the United States will not permit petitioner to be deprived of its property in such a way.

This Court has uniformly held that failure to give notice and afford an opportunity to be heard violates "the most rudimentary demands of due process of law".

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed2d 62 (1965);

Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962).

The opportunity must be granted at a meaningful time and in a meaningful manner.

Armstrong v. Manzo, supra;

Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779 58 L.Ed. 1363 (1914);

Mullane v. Central Hanover Bank, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 685, 873 (1950).

To satisfy the requirement, it is not only necessary that the notice reach the parties affected, but that it convey the required information.

Mullane v. Central Hanover Bank, supra.

The opportunity to be heard must be appropriate to the nature of the case.

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

All of the principles have been restated and affirmed by the California Supreme Court in *Horn v. Ventura County*, 24 Cal.3d 605, 156 Cal.Rptr. 718, 596 Pac.2d 1134 (1979)

and interestingly enough, by the same panel of justices who wrote the opinion here challenged in the recent case of *Kennedy v. City of Hayward*, 165 Cal.Rptr. 132, (1980).

Contrary to Federal Law the Purported Award Would Enforce a Restraint of Trade.

Insofar as the award has the effect of enforcing the Union's interpretation of Section 11 of its agreement, it violates the national public policy which condemns restraints of trade.

In the case of *Connell Company v. Plumbers & Steamfitters*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), this Court confirmed that §8e of the National Labor Relations Act is designed to strengthen the prohibition in §8B(4) against secondary activities by forbidding agreements which might be used to circumvent that section's ban on the use of economic coercion for secondary objectives. 421 U.S. at 628. There as here the employer was a stranger to the Union, and it may be that this factor is essential to the holding. Obviously in this case the very absence of such a relationship is dispositive and no sophisticated analysis is required.

However, it appears that the clause in question as interpreted and enforced in this case is contrary to the teaching of the *Connell* case; even under the assumption that petitioner is bound to the agreement. The key passage in this opinion on the point is at 421 U.S. 635.

> "We therefore hold that this agreement which is outside the context of a collective bargaining relationship and not restricted to a particular jobsite but which nonetheless obligates Connell to subcontract work only to firms that may have a contract with Local 100 may be the basis for a Federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from

elimination of competition over wages and working conditions."

It is crystal clear in this case that Section 11 as here interpreted, requires contractors, regardless of the particular jobsite involved, to employ only subcontractors having a contract with respondent local. There can be no question of competition over wages and working conditions, since these matters are set forth in the project specifications under the dictates of state and federal determinations of prevailing wages.

In *Connell* as well as in the later and interpretive 9th Circuit case of *Pacific Northwest Chapter of ABC v. NLRB*, 609 F.2d 1341 (1979) the rationale for the construction industry proviso was said to be to "preclude the possibility of members of the signatory union being required to share work with non union workers" (609 F.2d 1341; 1348).

The Court went on to hold:

> "A subcontractor clause in a contract with a particular union which flatly forbids the use of subcontractors who have no contract with the signatory union on jobsites, regardless of whether workers of the signatory union will also be employed on those sites, goes well beyond the kind of arrangement which the proviso was created to protect. If a general contractor assigns work on a construction site only to nonunion subcontractors, the problem of jobsite friction between union and nonunion employees of a particular craft or trade does not arise."

609 F.2d at p. 1350.

Since the clause in question as enforced here, requires subcontractors to hire only union labor belonging to this particular local, it is plainly violative of the Act.

Federal Law Misconstrued.

On page 5 of its Opinion, the California District Court of Appeal states:

> "As this matter involves an arbitration provision in a collective bargaining agreement between an employer and a labor organization representing employees in an industry affecting interstate commerce, we must apply federal substantive law." (*Opinion*, page 5.)

The Court then goes on to state a proposition which is well settled under California as well as Federal law, to wit:

> "The existence of an underlying agreement to arbitrate is to be decided by a court rather than an arbitrator (Safeway Stores, supra, 83 Cal.App.3d 430; Nolde Brothers, Inc. v. Bakery Workers, 51 L.Ed.2d 300; Delta Lines, Inc. v. International Brotherhood of Teamsters, 66 Cal.App.3d 960." (*Opinion*, page 7.)

Then in a startling series of non-sequiturs the Court first states the irrelevant proposition that a court's role in reviewing the validity of an arbitration award is narrow and may not disturb an arbitrator's findings on questions of law or fact, concluding that the Court must confirm the arbitrator's award if it can in any rational way be derived from the agreement.

Then ignoring the uncontroverted facts that petitioner never agreed to arbitrate with anyone and joined the Association only to secure its aid in *avoiding* union involvement, the Court holds:

> "Where a collective bargaining agreement provides that any contractor joining a party association is bound as an incident of membership, and the association bylaws state that the collective bargaining agreements of the association are binding on all members, a new member becomes bound to a pre-existing collective bargaining agreement upon joining the association (Washington Refrigeration Service Co. and Local Union No. 602, Steam, Refrigeration and General Pipefitters (1973) 206 N.L.R.B. 130). Once an employer delegates authority to a multi-employer association during or before negotiations of a new collective

> bargaining agreement, the employer will be held bound to the existing agreement, despite efforts to withdraw from negotiations or from the association (Authorized Air Conditioning Co. v. N.L.R.B. 9th Cir. 1979) 606 F.2d 899). The significant fact is the delegation of authority, not the employer's membership in the association (Cox Corp. v. N.L.R.B. (6th Cir. 1979) 593 F.2d 261, 262). Agency is a question of fact (N.L.R.B. v. R.O. Pyle Roofing Co. (9th Cir. 1977) 560 F.2d 1371)." (*Opinion*, pages 7-8.)

The Court thereby advances a novel proposition under Federal substantive labor law. To wit: that by joining a multi-employer bargaining unit an employer *automatically* becomes bound to all labor agreements which that entity has in spite of the fact that the particular entity may have other functions and include non-union members and in spite of the potential members unambiguously expressed intention in joining the Association.

There is, however, no such outrageous notion inhering in the Federal Labor law. The cases cited require some showing of an *intent* to become a part of the bargaining unit in the first place. It will doubtless come as a great shock to the many contractors who join trade associations as "non-union" members that they now run the risk of having their clearly expressed intentions disregarded.

Furthermore, this is not a case of negotiations for a contract being conducted on petitioner's behalf by an association and a withdrawal at the last minute. Whatever agreement was involved between the Union and the Association had been in effect for a year or more. Petitioner joined the Association in total ignorance of any such dealings. Petitioner sought the Association's aid only in connection with a specific limited dispute with the Union. In truth, the role of the Association in the affair was never clearly defined but what should be totally clear is that it never became petitioner's agent; neither directly since there was no au-

thorization nor indirectly through holding out since the Association's lack of authority was frequently and clearly pointed out commencing with the so-called "grievance" hearing.

At the very least, it must be said that the arbitrator was chosen without petitioner's participation. Respondent, fully advised concerning petitioner's revocation of its pending application in the Association and the Association's lack of authority to bind petitioner had no reason not to deal directly with petitioner. Nonetheless these parties continued with their sordid machinations, concealed from petitioner, which resulted in the kangaroo court proceedings now complained of.

It has been settled that an arbitrator who is not entirely disinterested may not validly decide a dispute. For example, in *Commonwealth Corp. v. Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968):

> "The issue before the court was posed by Justice Black: '*At issue in this case is the question whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration.*' That particular arbitration had been conducted pursuant to the United States Arbitration Act (9 U.S.C. §§1-14), whose provisions, the court said, 'show a desire of Congress to provide not merely for *any* arbitration but for an impartial one.' (p. 147, 89 S.Ct. p. 338; italics in original.) In vacating the arbitration award because the supposedly independent arbitrator had had business dealings with one of the parties, the Supreme Court made the following observation: 'Since in the case of courts [impartiality] is a *constitutional* principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and pro-

vides that an award can be set aside on the basis of "evident partiality" of the use of "undue means." [p. 148, 89 S.Ct. p. 339, italics in original.] . . . *we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.*' (p. 149, 89 S.Ct. p. 339; italics added.) Additionally, the Supreme Court laid down the requirement that arbitration must not only be unbiased, but must be seen to be unbiased. 'This rule of arbitration and this canon of judicial ethics rest on the premise that *any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.* We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.' (p. 150, 89 S.Ct. p. 340; italics added.)"

(Emphasis added.)

The teaching of this case is applicable to the present matter.

CONCLUSION.

The facts presented in this case represent a shocking misuse of the power of the State. Petitioner, guilty of no wrongdoing whatever, has been sucked into a judicial morass from which this Court is the last hope of escape. The property of petitioner is to be taken and given to others as a windfall by a summary process carried on with no consent and with no effective notice and opportunity to be heard. Surely, the Constitution of this nation does not permit such a result.

Dated: July 28, 1980

MONTELEONE & MCCRORY,
BY GEORGE ROBERT HALE,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, First Appellate District, Division Two.

Northern California District Council of Hod Carriers, et al., Plaintiffs and Respondents, v. Pennsylvania Pipeline, Inc., also known as Pennsylvania Pipeline Company and Pennsylvania Pipeline and Construction Company, Defendant and Appellant. 1 Civil No. 43845, (Sup. Ct. No. 490423-8)

Filed: March 6, 1980.

Pennsylvania Pipeline, Inc. (Employer) appeals from a judgment confirming an ex parte arbitration award in favor of the Northern California District Council of Hod Carriers and the Construction, Production and Maintenance Laborers Local Union No. 1130 (hereinafter collectively the Union). Employer contends that: 1) it never became bound by the collective bargaining agreement negotiated by the multi-employer association; 2) it was deprived of due process by the ex parte arbitration; 3) the award was contrary to public policy; and 4) venue was improperly laid. For the reasons set forth below, we have concluded that the judgment must be affirmed.

The pertinent facts, substantially as found by the court below, are are follows: The Employer became a member of the Underground Contractors Association of Northern California, Inc. (Association)[1] which was a party to the Laborer's Master Agreement (Master Agreement) with the Union, and in conjunction with a number of other multi-employer associations had negotiated a contract with the

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[1]The Association was a named defendant below and appeared, but is not a party to this appeal.

Union, which ran from June 1974, to June 1977. Section 9 of the Master Agreement set forth a procedure for the arbitration of grievances.

In November 1975, several disputes arose between the Employer and the Union on the Tuolumne Water District No. 2 Sonora to Columbia Intercepter Job. On November 25, 1975, the Union notified the Association of a grievance between the Employer and the Union: thereafter, the Union advised the Association of subsequent grievances against the Employer relating to the Columbia Intercepter Job. The Union charged that the Employer had hired persons other than laborers to perform laborers' work, in violation of certain provisions of the Master Agreement. The Employer's work on the Columbia Interceptor Job occurred between November 3, 1975, and May 13, 1976.

On December 16, 1975, pursuant to the terms of section 9 of the Master Agreement, a board of adjustment convened to hear the Union's grievances. The board of adjustment was comprised of two members appointed by the Association and two members appointed by the Union. The Employer was represented by its president, Peter Disandro, Jr., and John Pestana, the executive director of the Association. The board of adjustment heard and considered the grievances but became deadlocked.

About January 21, 1976, the Association notified the Employer that its membership was terminated, effective January 31, 1976. Thereafter, pursuant to the terms and conditions of section 9 of the Master Agreement, the attorney for the Union wrote to the Association requesting arbitration of the grievances and suggested the names of arbitrators. Robert Burns was selected and recommended June 30, 1976, and July 1, 1976, as hearing dates. By letter dated April 23, 1976, on the letterhead of the Association, Pestana, as executive director of the Association, notified

the attorney for the Union that he would be available on the dates selected. On May 11, 1976, the Union attorney notified Burns that the parties had accepted both dates.

On June 30, 1976, the attorney for the Union received a mailgram from the Employer stating that the Employer was not a member of the Association and that any arrangements for settlement of the grievances would have to be mutually agreed upon between the parties. At 10 a.m. on June 30, 1976, the attorney for the Union, with representatives of the Union, appeared in San Francisco at the time and place designated for the regularly scheduled arbitration hearing before Burns. No representative from the Association or the Employer appeared. The hearing was convened at 10:50 a.m. Both oral and documentary evidence was received. On July 20, 1976, Burns, sitting as a neutral fifth member of the board of adjustment, issued an arbitration opinion and award, sustaining the grievances of the Union.

The trial court concluded as a matter of law that: 1) the board of adjustment had jurisdiction to hear the grievances and delegate to Burns the right to hear, decide and issue an opinion and award; 2) the Association was the agent of the Employer at all times relevant and the Employer was bound by the acts and agreements of the Association; 3) through this agency, the Union and the Employer stipulated and agreed in writing to the date, time and place of the arbitration hearing; 4) the Employer violated the Master Agreement; 5) certain persons were deprived of work by the violation of the Master Agreement by the Employer; and 6) the Employer was obligated to pay them the amounts indicated.

In January 1977, the Union filed the instant petition for confirmation of the arbitration award, pursuant to Code of Civil Procedure, section 1285. The court subsequently entered its judgment confirming the award.

The parties agree that the major question on appeal is whether the court properly concluded that the Employer was bound by the arbitration provision of the Master Agreement.

The Employer contends that, at most, it had delegated to the Association only the authority to act as the Employer's agent for its direct or future collective bargaining agreements and, in any event, that this limited agency was revocable and had been revoked.

The record indicates that the Employer executed an application for membership in the Association on July 3, 1975, and paid the $100 membership fee. Above the subscription, in type the same size as the rest of the application, paragraph 1 reads: "That the *certificate of membership* to be issued *shall be subject to the provisions of the . . . By-Laws . . . in force or hereafter adopted by* [*the Association*] *and such . . . By-Laws . . . shall be considered an essential part of the contract of membership between* [*the Association*] *and the undersigned*" (emphasis added).

Section 7 of article I of the by-laws states, in pertinent part: "*Each contractor member* of the Association *grants, appoints and designates the Board* of Directors, or its duly designated nominee *as representative, agent and attorney-in-fact, with full powers to negotiate with all labor union and labor organizations with which the member has or may have collective bargaining relations, and to execute contracts* and amendments *with such organizations for and on behalf of the Council and its members, subject to the approval of the Board of Directors* as provided herein.

"No member of the Association shall sign a collective bargaining agreement that is other and different than the agreement negotiated by the Association for and on behalf of itself and each and every member." (Emphasis added.)

Section 2 of the Master Agreement provided that the Association was the bargaining agent for all of its present and future members.

Section 16(a) of the Master Agreement provides: "The [overall multi-employer association] and each Signatory Association further warrants and represents that *any person, firm or corporation which may become a member of* [*the* overall multi-employer *association*] or any Signatory Association *shall automatically become subject to and bound by this Agreement*" (emphasis added).

The trial court's helpful memorandum opinion accompanying its initial order of confirmation stated that the Employer, by seeking and receiving membership in the Association, become a party to the agreement, and accordingly, was obligated to resolve its differences with the Union through arbitration, as provided in the Master Agreement. The court noted that "Article I, Section 7, of the . . . By-Laws *with its provisions regarding collective bargaining is not in small print or inconspicuous*," and that the Employer had actual knowledge of this provision and knowingly consented to the Association acting on its behalf.

As this matter involves an arbitration provision in a collective bargaining agreement between an employer and a labor organization representing employees in an industry affecting interstate commerce, we must apply federal substantive law (Safeway Stores, Inc. v. Brotherhood of Teamsters, 83 Cal.App.3d 430, 435-437).

The existence of an underlying agreement to arbitrate is to be decided by a court rather than an arbitrator (Safeway Stores, supra, 83 Cal.App.3d 430; Nolde Brothers, Inc. v. Bakery Workers, 51 L.Ed.2d 300; Delta Lines, Inc. v. International Brotherhood of Teamsters, 66 Cal.App.3d 960).

The role of a court in reviewing the validity of an arbitration award under a collective bargaining agreement is an extremely narrow one. Findings on questions of law or fact by the arbitrator are final and conclusive. Neither the merits of the controversy nor the sufficiency of the evidence to support the arbitrator's award are matters for judicial review. A court must affirm an arbitrator's award of it can in any rational way be derived from the agreement, and can only reverse if there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop (Safeway Stores, supra, p. 437).

Where a collective bargaining agreement provides that any contractor joining a party association is bound as an incident of membership, and the association by-laws state that the collective bargaining agreements of the association are binding on all members, a new member becomes bound to a pre-existing collective bargaining agreement upon joining the association (Washington Refrigeration Service Co. and Local Union No. 602, Steam, Refrigeration and General Pipefitters (1973) 206 N.L.R.B. 130). Once an employer delegates authority to a multi-employer association during or before negotiations of a new collective bargaining agreement, the employer will be held bound to the existing agreement, despite efforts to withdraw from negotiations or from the association (Authorized Air Conditioning Co. v. N.L.R.B. (9th Cir. 1979) 606 F.2d 899). The significant fact is the delegation of authority, not the employer's membership in the association (Cox Corp. v. N.L.R.B. (6th Cir. 1979) 593 F.2d 261, 262). Agency is a question of fact (N.L.R.B. v. R. O. Pyle Roofing Co. (9th Cir. 1977) 560 F.2d 1371).

It is undisputed that the Employer became a member of the Association. The membership application indicated that the by-laws were an essential part of the agreement between the Association and the members. While section 7 could be

more felicitiously drafted, it states that "Each contractor[2] member . . . designates . . . [the Board] . . . as representative, agent and attorney-in-fact, with full powers to negotiate with all labor . . . organizations . . . and to execute contracts . . . with such organizations for and on behalf . . . of the [organization] . . . ." We note that in Authorized Air Co., supra, 606 F.2d, p. 904, as in the instant case, the employer argued that it had not read the by-law provisions and that it had joined the association for other purposes. Also in point is Local 24, IBEW v. Bloom & Co. (U.S. D.C. 1965) 59 L.R.R.M. 2545. In Local 24, IBEW, the contractor never signed a document in which he agreed to be barred by the collective bargaining agreement between the contractors' association and the union. The employer's conduct in availing itself of the hiring facilities under the agreement was held to be a sufficient indication of the employer's intent to be bound by the agreement and its arbitration provision.

As to the Employer's reasons for joining the Association and its intent to be bound by the Master Agreement, the court properly considered the Employer's conduct. In November, the Employer demanded that the Union supply laborers for the Columbia Intercepter Job. In December, the Employer and the Association participated in the first part of the grievance hearing which was conducted in accordance with procedures set forth in the Master Agreement.

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[2]We need not discuss the Employer's belated contention that it was not a contractor, but only an affiliate member of the Association and, therefore, not bound by the collective bargaining agreement, pursuant to article 1, section 8 of the by-laws. This argument was raised for the first time in the Employer's closing brief; it was not raised below. Accordingly, the Employer is precluded from raising the issue on appeal.

Thus, we conclude that the trial court's interpretation of article I, section 7, was reasonable in the light of the Employer's conduct. An appellate court will accept a reasonable interpretation of a writing adopted by the trier of fact and will not substitute its own interpretation where extrinsic evidence is introduced in aid of interpreting the writing (Back v. New York Merchandise Co., 196 Cal.App.2d 434, 443). Where substantial evidence supports the trial court's findings of fact, there can be no appellate review of weight and credibility of the evidence (San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co., 28 Cal.App.3d 556). We hold that the trial court properly concluded that the Employer was bound by the Master Agreement, the Association's existing collective bargaining agreement with the Union.

The Employer next argues that any agency was terminated and revoked when its membership in the Association terminated on January 31, 1976. Termination of a collective bargaining agreement does not extinguish the duty to arbitrate if a dispute arose during the life of the agreement (Nolde Brothers, supra, 51 L.Ed.2d, p. 308). The right of access to the grievance procedure is deemed "vested" as of the date that the alleged grievance arises, even if arbitration is not demanded until after expiration of the agreement (General Tire & Rubber Co. v. Local 512, Etc., 191 F.Supp. 911, affirmed 294 F.2d 957). An employer is bound to a contract when, on a theory of apparent authority conveyed to a union, the union understands the multi-employer association to effectively operate for the employer (N.L.R.B. v. R O. Pyle Roofing, supra, 560 F.2d 1371). A principal is bound by the authorized acts of agents and those which he has allowed third persons to believe he has authorized (Smeade v. Rosen, 121 Cal.App. 79). The trial court found that the Employer "had actual knowledge of (Article I Sec-

tion 7 f the by-laws) and knowingly consented to the association acting on its behalf long before its last minute withdrawal from the association." We hold that the trial court properly concluded that the Employer neither effectively withdrew from its obligation under the Master Agreement, nor effectively terminated the agency of the Association.

We turn next to the Employer's contention that it was deprived of due process by the ex parte arbitration proceeding. To so hold would result "in a state of anarchy if the parties . . . could avoid decisions by the simple process of taking their dolls and going home" (Retail Employees v. Lion Dry Goods, Inc. (6th Cir. 1967) 67 L.R.R.M. 2871, 2873, cert. den. 390 U.S. 1013). If an agreement to arbitrate is self-executing, an arbitrator does not exceed his powers in a proceeding without the participation of one of the parties, and over his objections (Mitchum, Jones & Templeton, Inc. v. Chronis, 72 Cal.App.3d 596). In an action to vacate an ex parte award, a petitioner must show a refusal, not merely a failure to consider evidence (Gonzales v. Interinsurance Exchange, 84 Cal.App.3d 58).

Accordingly, there is no merit to the Employer's contention that he was deprived of due process by the ex parte arbitration (International Brotherhood of Electrical Workers v. Silva, 96 Cal.App.3d 751, 761).

We do not deem it necessary to discuss in detail the Employer's contentions that the award contravened public policy as: 1) the subcontractor clause of the underlying agreement operates as an unlawful restraint of trade; 2) the award was punitive and amounts to a forfeiture; and 3) the Union was an unlicensed collection agency.

The Employer's restraint of trade argument is predicated on Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616,

rehearing denied 423 U.S. 884. Connell is inapposite. There, the anticompetitive effect arose from a subcontractor clause that the union had forced on the employer in a separate and non-collective bargaining agreement. Here, the subcontractor clause was part of a collective bargaining agreement (cf. Cal. Dump Truck v. Associated General Contractors (9th Cir 1977) F.2d 607.

As to the alleged forfeiture, the face of the award reveals specific and reasoned bases for the award and did not arise from an irrational construction of the provisions of the Master Agreement (see Lesser Towers, Inc. v. Roscoe-Ajex Constr. Co., 271 Cal.App.2d 675). The authorities cited by the Employer do not pertain to arbitration awards or collective bargaining relations. It cannot be urged on appeal that an arbitration agreement is void even if it authorizes penalties, so long as the face of the award or the record sustains a finding of non-forfeiture (United Farmers Assn. of Cal. v. Klein, 41 Cal.App.2d 766). Accordingly, the Employer was precluded from raising it for the first time on appeal.

The Employer also contends that the venue for the instant petition did not lay in Alameda County, as the arbitration was held in the City and County of San Francisco. However, the Employer has waived any claim he may have had as to this issue by filing a response to the Union's petition. Code of Civil Procedure section 396b, so far as pertinent, requires a separate motion for change of venue "without answering or demurring" (Dugar v. Happy Tiger Records, Inc., 41 Cal.App.3d 811, 819). The Employer's failure to file a separate motion for change of venue precludes it from raising the issue on appeal.

Affirmed.

CERTIFIED FOR PUBLICATION.

Taylor, P.J.

WE CONCUR:

Rouse, *J.*

Miller, *J.*

Trial Court:	Superior Court, Alameda County
Trial Judge:	Leonard Dieden
Attorneys for Appellant:	Monteleone & McCrory Wilmer E. Windham 5900 Wilshire Boulevard Suite 2900 Los Angeles, Ca. 90036
Attorneys for Respondents:	Van Bourg, Allen, Weinberg & Roger Victor J. Van Bourg David A. Rosenfeld 45 Polk Street San Francisco, Ca. 94102

Northern California District
Council of Hod Carriers v.
Pennsylvania Pipeline
1 Civil No. 43845

Order Granting Confirmation of Arbitration Award.

In the Superior Court of the State of California, in and for the County of Alameda, Before the Honorable Leonard Dieden, Judge, Department No. 23.

Northern California District Council of Hod Carriers, Building and Construction Laborers: and Construction, Production and Maintenance Laborers Local Union No. 1130, Petitioners, v. Underground Contractors Association of Northern California: and Pennsylvania Pipeline, Inc., also known as Pennsylvania Pipeline Company and Pennsylvania Pipeline and Construction Company, Respondents. No. 490423-8.

Filed: Mar. 7, 1977.

This action involves a petition by the Northern California District Council of Hod Carriers, Building and Construction Laborers and Local 1130 of the Laborers Union which seeks confirmation of an arbitration award made against the Pennsylvania Pipeline and Construction Company, Inc. This award was made pursuant to a collective bargaining agreement known as the 1974-1977 Laborers' Master Agreement which was entered into in July 1974, by the Associated General Contractors of California, Inc., whose members comprise a majority of the individual employers in the highway, general building, and heavy construction industry, and the petitioner, Norther California District Council of Hod Carriers, Building and Construction Laborers. Respondent Underground Contractors Association of Northern California was aparty to this agreement and its affiliated members, both those who belonged to the Association at the time the agreement was executed and those who joined while it was in effect, were bound by its terms.

Section 9 of the Laborers Master Agreement outlines a procedure by which disputes which involve the interpreta-

tion or application of that agreement are resolved. Petitioners allege that Pennsylvania Pipeline was a member of the Underground Contractors Association and, as such, was obligated to follow that procedure when a grievance concerning the payment of wages and other benefits arose between the Laborers Union and that company in November, 1975. Pennsylvania Pipeline refused to participate in the proceedings in which an arbitrator found that company liable to the petitioners.

In opposing confirmation of the award, Pennsylvania Pipeline alleges that it was not bound at any time by a collective bargaining agreement with the petitioners. Any agreement that it did have with the petitioners, it argues, was an oral and informal understanding relating to the furnishing of laborers which did not, in any event involve an agreement to arbitrate any dispute. Lastly, respondent Pennsylvania Pipeline maintains that it received no notice of the alleged arbitration proceedings, had no opportunity to participate in the selection of the arbitrator, attended no hearings, and submitted no evidence to the arbitrator.

Arbitration awards are favored by the courts of this state and substantial compliance with the applicable statute is all that is necessary to support an award. (*Pucinelli v. Nestor* (1956) 145 Cal.App.2d 48, 301 P.2d 92.) Because of this, the "merits of a controversy, the form and sufficiency of the evidence to support the award of the arbitrator, and the credibility and good faith of the parties, in the absence of corruption, fraud, or undue means in obtaining the award are not matters for judicial review." (*Archuleta v. Grand Lodge of International Association of Machinists* (1968) 262 Cal.App.2d 202, 68 Cal.Rptr. 694.) Nevertheless, arbitration is a matter of contract and, as the Court of Appeal stated in *Unimart v. Superior Court for County of Los Angeles* (1969) 1 Cal.App.3d 1039, 1045, 82 Cal.Rptr. 249,

253, "in spite of the strong policy in its favor, an employer cannot be compelled to arbitrate if the arbitration agreement is not binding upon it. Accordingly, an arbitrator has no power to determine the rights and obligations of one who is not a party to the arbitration agreement or arbitration proceedings." In other words, where "the existence of an arbitration contract is admitted or found, it is for arbitrators and not the courts to resolve any doubts as to its meaning and extent" (*Kustom Kraft Homes v. Lewenstein* (1971) 14 Cal.App.3d, 92 Cal.Rptr. 650) but the basic rule is that the courts determine whether an arbitration contract exists or not. (*Berman v. Renart Sportswear Corp.* (1963) 222 Cal.App.2d 385, 389, 35 Cal.Rptr. 218, 220.)

The issue to be decided in this action is whether or not respondent Pennsylvania Pipeline was a member of the Underground Contractors Association of Northern California and therefore bound to participate in the grievance procedure as set forth in Section 9 of the 1974-1977 Laborers' Master Agreement. A review of the record shows that Pennsylvania Pipeline, by seeking and receiving membership in that association, designated the Underground Contractors Association as its agent, became a party to the agreement, and, accordingly, was obligated to resolve its differences with the Laborers Union through arbitration proceedings. Article 1, Section 7, of the Underground Contractors Association By-Laws with its provisions regarding collective bargaining is not in small print or inconspicuous. Pennsylvania Pipeline had actual knowledge of this provision and knowingly consented to the association acting on its behalf long before its last minute withdrawal from the association. Since written agreements to submit an existing controversy to arbitration are valid, enforceable, and irrevocable in this state and no other statutory grounds for vacation exist, petitioners' award must be and is hereby confirmed.

DATED: March 7, 1977.

/s/ Leonard Dieden,
Judge of the Superior Court

Court of Appeal of the State of California, in and for the First Appellate District, Division Two.

Northern California District Council of Hod Carriers, Building and Construction Laborers; and Construction, Production and Maintenance Laborers Local Union No. 1130, Plaintiffs & Respondents, vs. Pennsylvania Pipeline, Inc., also known as Pennsylvania Pipeline Company and Pennsylvania Pipeline and Construction Company, Defendant and Appellant. 1/Civil No. 43845, Alameda Superior Court No. 490423-8.

Filed: Apr. 4, 1980.

BY THE COURT:

Petition for Rehearing is denied.

Dated Apr. 4, 1980.

Rouse, J. Acting P.J.

Clerk's Office Supreme Court, 4250 State Building, San Francisco, California 94102.

Filed: Apr. 30, 1980

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 43845, Northern California District Council of Hod Carriers vs. Pennsylvania Pipeline, Inc.

Respectfully,

Clerk

APPENDIX B.

Underground Contractors Association
of Northern California, Inc.

A Chapter of National Utility Contractors Association
1671 The Alameda, Suite 217, San Jose, California
95126 Telephone: (408) 287-7800

MEMBERSHIP APPLICATION

The undersigned ..... hereby subscribes for a Contractor (xx) or Associate ( ) membership in Underground Contractors Association of Northern California (and the National Utility Contractors Association), a non-profit corporation formed under and pursuant to the provisions of the General Non-Profit Corporation Law of the State of California, at and for a total membership fee of One-Hundred ($100.00) Dollars, and agrees to pay dues as follows:

1. *Contractor Membership*

(a) Forty-Two ($42.00) Dollars per month payable quarterly in advance on or before the 10th day of each calendar quarterly month following receipt of a membership certificate, if the undersigned's estimated gross annual business is One Hundred Thousand ($100,000.00) Dollars or less.

(b) Fifty-Two ($52.00) Dollars per month payable quarterly in advance on or before the 10th day of each calendar quarterly month following receipt of a membership certificate, if the undersigned's estimated gross annual business is over One Hundred Thousand ($100,000.00) Dollars, but less than Five Hundred Thousand ($500,000.00) Dollars.

(c) Sixty Two ($62.00) Dollars per month payable quarterly in advance on or before the 10th day of each calendar quarterly month following receipt of a membership certif

icate, if the undersigned's estimated gross annual business is over Five Hundred Thousand ($500,000.00) Dollars.

2. *Associate Membership*

(a) Three Hundred ($300.00) Dollars per year payable quarterly in advance on or before the 10th day of each calendar quarterly month following receipt of a membership certificate. This subscription is subject to the terms, conditions and instructions contained in the permit of the Commissioner of Corporations authorizing the taking of this subscription.

This subscription is also subject to acceptance by the Underground Contractors Association of Northern California within thirty (30) days, and should the application be so accepted the undersigned agrees as follows:

1. That the certificate of membership to be issued shall be subject to the provisions of the Articles of Incorporation, By-laws, Code of Ethics and Rules and Regulations, in force or hereafter adopted by the Underground Contractors Association of Northern California and such Articles of Incorporation, By-Laws, Code of Ethics and Rules and Regulations shall be considered an essential part of the contract of membership between Underground Contractors Association of Northern California and the undersigned.

2. That should any member fail to pay dues within thirty (30) days after notice from Underground Contractors Association of Northern California of the due date, such members shall be automatically suspended until such indebtedness is paid.

Dated: .....

..... Subscriber

By: ..... Executive Director

By: .....

.....
Address

Accepted:

Underground Contractors Association of Northern California

.....
Phone

By: .....
President

Excerpts — By Laws Underground Contractors Assn. of Northern Calif. Inc.

Section 7.

Each contractor member of the Association grants, appoints and designates of Board of Directors, or its duly designated nominee as representative, agent and attorney-in-fact, with full powers to negotiate with all labor union and labor organizations with which *the member* has or may have collective bargaining relations, and to execute contracts and amendments with such organizations for and on behalf of the Council and its members, subject to the approval of the Board of Directors as provided herein. Any economic action by any labor organization against any member shall be deemed to be a like action against all members of this Association and each and all members expressly agree to take united and joint action and support every other member of the Association when requested by the Board of Directors.

No member of the Association shall sign a collective bargaining agreement that is other and different than the agreement negotiated by the Association for and on behalf of itself and each and every member. Violation of any of the above provisions shall be cause for disqualification, suspension or expulsion by the Board of Directors as hereinbefore provided.

Section 8.

Any contractor member in good standing may, upon written request to the Board of Directors, change his status to that of an Affiliate Contractor Member. Affiliate Contractor Members shall have all the same rights, privileges and duties as Contractor Members except that they will not be bound by any labor negotiations or agreements made or entered into by the Association pursuant to Article 1, Section

7 of the By-Laws. Any Affiliate Contractor Member in good standing may, upon request to the Board of Directors, change his status to that of a Contractor Member, and any new member who possesses the qualifications set forth in Article 1, Section 2 of the By-Laws, may join this Association as either a Contractor Member or an Affiliate Contractor Member, at his option. (Emphasis added)

Section 11 "Master Labor Agreement"

Section 11 of the agreement provides:

"The terms and conditions of this Agreement insofar as it affects Employer and the individual employer shall apply equally to any subcontractor under the control of, or working under oral or written contract with such individual employer on any work covered by this Agreement, and said subcontractor with respect to such work shall be considered the same as an individual employer covered hereby.

"Subject to the provisions of this Section and any other Section of this Agreement applicable to subcontractors, if an individual employer shall subcontract work herein defined, such subcontract shall state that such subcontractor agrees to be bound by and comply with the terms and provisions of this Agreement.

"A subcontractor is defined as any person, firm or corporation who agrees under contract with the Employer, or any individual employer, or a subcontractor of the Employer, or any individual employer to perform on the job site any part or portion of the construction work covered by the prime contract, including the operation of equipment, performance of labor and installation of materials.

"An individual employer who provides in the subcontract that the subcontractor will pay the wages and benefits and will observe the hours and all other terms and conditions of this Agreement, shall not be liable for any delinquency by such subcontractor in the payment of any wages or fringe benefits provided herein, including payments required by Section 28 (Health & Welfare, Pension, Vacation-Holiday-Dues Supplement and Training & Retraining Funds) except as follows:

"The individual employer will give written notice to the Union of any subcontract involving the performance of work covered by this Agreement within five (5) days of entering such subcontract, and shall specify the name and address of the subcontractor.

"If thereafter such subcontractor shall become delinquent in the payment of any wages or benefits above specified, the Union shall promptly given written notice thereof to the individual employer and to the subcontractor specifying the nature and amount of such delinquency.

"If such notice is given, the individual employer shall pay and satisfy the amount of any such delinquency by such subcontractor occurring within seventy-five (75) days prior to the receipt of said notice from the Union, and said individual employer may withhold the amount claimed to be delinquent out of the sums due and owing by the individual employer to such contractor.

"In the event the individual employer fails to give written notice of a subcontract as required herein, such individual employer shall be liable for all delinquencies of the subcontractor on that job or project without limitation.

"The individual employer shall not be liable for any such delinquency if the Local Union where the delinquency occurs refers any employee to such subcontractor after giving such notice and during the continuance of such delinquency.

"The individual employer shall be not liable for any such delinquency occurring more than seventy-five (75) days prior to receipt of written notice from the Union."

APPENDIX C.

The federal issues were raised below at the first opportunity and uniformly urged. Of course, the very idea of taking property through a nonjudicial process carried on without consent is a gross violation of due process rights and this was the principal point made before each of the tribunals below. Each of these courts avoided this issue by pretending that Petitioner had agreed to arbitrate: ignoring the total lack of evidence.

In addition, the federal issues were specifically addressed as follows:

TRIAL COURT.

Due Process, C.T. 83 - 84; C.T. 210
Forfeiture, C.T. 84 - 85
Interpretations of Labor Relations Act, C.T. 85-86

DISTRICT COURT OF APPEAL.

Opening Brief.

"V. APPELLANT WAS NOT AFFORDED DUE PROCESS IN CONNECTION WITH THE ARBITRATION HEARING.

The record shows that appellant operated as an openshop contractor and joined the Association in order to avoid involvement with unions (C.T. 53:27-28; C.T. 54:28 to 55:16; C.T. 214:3-9). Upon being advised of the contention that the application for membership bound appellant to a collective bargaining agreement appellant promptly took steps to withdraw from the Association (C.T. 56:25 - 57:2; 214:10-17). This was done, effective January 31, 1976 (Counterfinding #4 (C.T. 224) allowed by order (C.T. 235)). Respondent was given prompt notice of this and of the Association's lack of authority (C.T. 56:18 - 57:2; C.T. 218, 219; C.T. 221).

Nonetheless, respondent continued to process its secret "arbitration" proceeding. The so-called grievance meeting of December 16, 1975 involved the conduct of Stan Maples who had a paving subcontract for a little over $9,000.00 (C.T. 48:3-15; C.T. 231-232-233; C.T. 59:28 - 60:2). The claim was made that Stan Maples was obligated to employ union laborers (C.T. 48:3-12). Such a dispute could not possibly have involved more than the amount of the subcontract. Moreover, appellant maintained uniformly that there was no union obligation and in any event such a subcontractor clause was illegal. (C.T. 48:3-12; C.T. 56:14-22.)

On June 29, 1976, appellant discovered that a hearing on his dispute with the laborers was on the following day (C.T. 48:16-27). Refusing to recognize their authority and in any case with no time to prepare, appellant did not appear. Later appellant discovered that the small controversy involving a subcontractor had suddenly escalated into an arbitration award of over $70,000.00.

Surely the Constitutions of the United States and of this State will not permit appellant to be deprived of its property in such a way.

Curtis v. Sacramento,

64 Cal. 102 (1883). (C.T. 145)

VI. AN ARBITRATOR'S ERROR OF LAW MAY BE EXAMINED IF THE AWARD VIOLATES PUBLIC POLICY.

An additional ground for refusing to enforce the purported award may be found in the cases which hold that an arbitration award may not be used as a vehicle to circumvent a strong public policy. For instance, in *Black v. Cutter Laboratories,* 43 Cal.2d 788, 278 Pac.2d 905 (1955), the Court refused to enforce an arbitration award reinstating a

high security risk in a plant producing antibiotics for military use. Similarly, in *Loving & Evans v. Blick*, 33 Cal.2d 603, 204 Pac.2d 23 (1949), (C.T. 154) the Court refused to enforce an arbitration award in favor of an unlicensed contractor.

There is perhaps no stronger public policy at work in this State than that which prohibits forfeitures. The award of the arbitrator in this case is entirely punitive in character. It is not based upon any theory of compensation nor can it be shown that anyone received anything of value for the seventy-odd thousand dollars which this arbitrator would require respondent to pay. Cases announcing this principle are legion. For example, see:

Atkins v. Anderson, 139 Cal.App.2d 918, 294 Pac.2d 727 (1956);

Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 128 Pac.2d 665 (1942);

Gattian v. Coleman, 86 Cal.App.2d 266, 194 Pac.2d 728 (1948);

Wiseman v. McNulty, 25 Cal. 230 (1864);

Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 Pac. 369 (1917);

Quatman v. McCray, 128 Cal. 285, 60 Pac. 855 (1900).

Furthermore, insofar as the award has the effect of enforcing the Union's interpretation of Section 11 of its agreement, it violates the national public policy which condemns restraints of trade. Section 11, which is quoted verbatim commencing on page 13 of the purported award (C.T. 18) is, of course, susceptible of an interpretation which is entirely legal. If Section 11 is interpreted to mean that all persons employed on the subject project shall be paid the prevailing minimum wage in the area as required by the project specifications and Labor Code Section 1773, then

there can be no quarrel with the clause. All it would mean is that contractors are bidding on the work on the basis of the same labor costs and one contractor cannot secure an unfair advantage by paying substandard wages; to the end that competition among bidders is on the basis of managerial efficiency.

However, the arbitrator seeks to penalize Pennsylvania Pipeline & Construction Co., Inc. because its subcontractor, Stan Maples Paving, was not a member of *this particular local*. (C.T. 21.) It is thus contrary to the teaching of a number of recent Federal cases following the lead of the United States Supreme Court in *Connell Company v. Plumbers & Steamfitters Local 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). (C.T. 167.)''

Closing Brief.

"1. *Appellant Never Agreed to Arbitrate.*

No information of any kind was brought to appellant's attention during its brief association with the Underground Contractor's Association that would give anyone the slightest clue that the Company was agreeing to be bound by any collective bargaining agreements or agreeing to be bound by any arbitration clause. Respondent does not cite any part of the record to the contrary, because, of course, there is no such evidence.

The cases cited by appellant make it clear that an agreement to arbitrate must somehow be brought to the attention of the party sought to be bound. See, e.g.,

Wheeler v. St. Joseph Hospital,
63 Cal.App.3d 345, 133 Cal.Rptr. 775 (1976).

2. *The Association By-Laws do not Apply to Appellant.*

Even if the by-laws mentioned in the application signed by appellant had been exhibited to appellant as requested, they do not, as blithely assumed by respondent, bind new members to collective bargaining agreements of the Association, but only operate to appoint the Association as agent for "contractor members" to deal with labor unions, *if any*, with which the *member* has or may have collective bargaining agreements. Respondent does not suggest any reason why this clause does not mean exactly what it says. Since appellant had no collective bargaining agreement with respondent, and since appellant's intention, at most, was to be an "affiliate contractor member", the clause is not operative as to these parties.

Elevator Operators Union v. Newman, 30 Cal.2d 799, 807, 186 Pac.2d 1 (1947).

Here the purported principal and agent mutually terminated whatever relationship they had not later than January 31, 1976 (C.T. 56:22 - 57:2; C.T. 66). As pointed out above, the Union had adequate and ample notice of the Association's lack of authority both orally and in writing.

Indeed, the Union knew perfectly well that appellant intended to operate on an open shop basis from the inception of the project. In his uncontroverted declaration, Mr. DiSandro, appellant's President, testifies that he was contacted by respondent's Mr. Miller shortly after the job was awarded and on at least two occasions thereafter, and on each occasion expressly declined to execute a short form agreement (C.T. 54:25 - 55:5; C.T. 55:22-25).

Thus, any purported dealings with the Association cannot be binding upon appellant.

5. *The Purported Award was Strictly Punitive.*

The arbitration award did not, as respondent contends on page 4 "make certain employees whole for the losses suffered". The amounts "awarded" were wildly excessive in relation to the actual events involved.

Appellant, operating as an "open shop" contractor employed both union and non-union laborers (C.T. 53:27-28). The wage rates were fixed by law at the prevailing union rate for the job classifications involved (C.T. 53:28 - 54:10). Attempting to add to the pressure on appellant in connection with a dispute with the Operating Engineers, respondent ordered its members to leave the job (C.T. 55:26 - 56:4). Thus, if anyone has been damaged in this matter, it is appellant.

Furthermore, all qualified union employees who wished to work were allowed to work (C.T. 55:1-5). Pfeiffer and Rice were part time employees who were paid in full for all hours worked (C.T. 58:25-28). The "arbitrator" would

give them over $1,000.00 each in wages and benefits (C.T. 26, 28, 29, 30 and 31). Marston and Harrison were employed by appellant during the entire project except for a month or so during which they voluntarily absented themselves during the improper work stoppage instituted by respondent (C.T. 59:1-7). The "arbitrator" would give each of them over $12,000.00! (C.T. 26, 27, 28, 29, 30 and 31.)

Ralph, Cowley and Lee were supposedly entitled to be employed by Maples Paving, appellant's non-union subcontractor (C.T. 20). Maples' subcontract was for a total of $9,105.50 (C.T. 59:28). In other words, $9,000.00 was to pay for all material, equipment and labor to perform all necessary paving on the job. Yet, the "arbitrator" would award three men who weren't even there over $18,000.00, or double the amount of the entire job! (C.T. 25 - 31.) In this way he would make them whole."

Petition For Rehearing.

"II.

THERE IS NO EVIDENCE THAT APPELLANT AGREED TO ARBITRATE.

The opinion starts with the assumption that appellant knowingly bound itself to a collective bargaining agreement and cites the provisions of the master agreement and the Association's by-laws as though appellant somehow knew about these things when it performed the completely innocent act of joining the Association. But this is absolutely not so.

The Trial Court pointed out that the *provision regarding collective bargaining is not in small print or inconspicuous.* But there is *NO EVIDENCE OF ANY KIND WHATSOEVER* that appellant had actual or even constructive knowledge of this provision. Rather than dwell upon this obvious and fatal gap in respondents' case, the Court rehearses certain circumstances supposedly providing the necessary factual underpinning. But an examination of these matters should make make it clear that they simply do not support the conclusion that appellant voluntarily agreed to submit any dispute with the union to arbitration. Consider them in order:"

"In a terrible perversion of appellant's perfectly innocent act of attending the meeting of December 16, 1975, the Court construes it as constituting an endorsement and acceptance of the "procedures set forth in the master agreement." The evidence, however, is that at the time of this meeting, appellant did not have any knowledge actual or constructive of any such procedures. The moment it was suggested that something more was involved than an informal settlement conference, appellant made its position clear and took steps to withdraw from the Association. (C.T.

214:10-17; 56:18 - 57:2.) The notion that by attending the meeting to announce that it was not bound, it thereby became bound is mind boggling."

"VII.

THE FORFEITURE ISSUE WAS RAISED BELOW AND IS WELL FOUNDED.

On page 12 of the opinion appears the statement that "the award . . . did not arise from an irrational construction of the provisions of the Master Agreement" and "accordingly, the Employer was precluded from raising it for the first time on appeal."

The Court has apparently overlooked the factual showing starting at page 58, line 17, and continuing to page 60, line 2, and the argument directed to the Trial Court commencing at page 84, line 21.

Furthermore, the award constitutes an obvious and demonstrable forfeiture. The arbitrator decided that 3 men, Ralph, Cowley and Lee, were entitled to the jobs held by the employees of Stan Maples who performed a subcontract for $9,105.50 (C.T. 59:28). He awarded them the following amounts:

	"Wages"	"Subsistence"	"Fringes"			
Melvin Ralph	$ 3,741.60	$ 780	$ 384	$ 672	$ 432	$ 48
Gary Cowley	3,669.60	780	384	672	432	48
Sherman Lee	3,621.60	780	384	672	432	48
	$11,032.80	$2,340	$1,152	$2,016	$1,296	$144

TOTAL: $17,980.80

In others words, $9,105.50 paid for all the paving on the job, including wages at what amount to union rates (C.T. 53:28 - 54:10; C.T. 63). If having to pay double the amount of any possible work involved including subsistence to men

who were not on the job and obviously did not "subsist" is not a forfeiture, then the word has taken on new meaning.

Furthermore, as pointed out to the Court, many of the workmen involved left the job improperly at the urging of their union, but returned and were actually working for appellant and being paid for the same periods for which they are now to be compensated again (C.T. 58:25 - 59:11). This is a forfeiture."

"II. THE CASE PRESENTS IMPORTANT QUESTIONS OF LAW WHICH WERE APPARENTLY SETTLED AND WHICH WOULD BE RENDERED AGAIN UNCERTAIN IF THE DECISION BELOW IS ALLOWED TO STAND.

1. Heretofore it has been settled that while arbitration is a favored means of resolving disputes and relieves the Courts of considerable pressure, each citizen is entitled to decide for himself whether he wishes to sacrifice the full protection of the law in exchange for the speed of decision and arbitrator's expertise usually entailed in arbitration. Thus, the rule has been developed in a number of cases that an agreement to arbitrate will not be presumed and that the party contending for arbitration has the burden of showing that this method of resolving the dispute was voluntarily entered into either directly or through an authorized agent. In this case, appellant has been bound to arbitrate in *defiance* of its intention and desire, clearly and frequently communicated to all interested parties.

2. Heretofore an agency was created either by statute, by estoppel, or by the express consent of the principal. In the latter case, the agent's power could be terminated at the instance of the principal. This case creates a new class of agent, to wit: the automatic agent. Once loosed upon the world, the automatic agent, like some creature from Pandora's Box, may not be called back again.

3. Heretofore it has been settled that in order to deprive a citizen of his property, some sort of notice and opportunity to be heard must be afforded. In this case, without any knowledge of what was happening until the affair assumed the sanctified garb of an arbitration "award", appellant found itself ensnared in these proceedings.

4. Heretofore it has been settled that an arbitrator's power to deal with legal issues did not include the power to render an award contrary to public policy. In this case, the "award" constitutes a clear and demonstrable forfeiture and also violates the Federal policy announced in *Connell Company v. Plumbers & Steamfitters*, 421 U.S. 616, 44 L.Ed.2d 418, 95 S.Ct. 1830 (1975)."